

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EDWARD SCHAAR,

Defendant-Appellant.

UNPUBLISHED

May 26, 2005

No. 253944

Alger Circuit Court

LC No. 03-001565-FH

Before: Murray, P.J., and O’Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction of assaulting a prison employee, MCL 750.197. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of three to fifteen years. Because the claim of a videotape of the confrontation involving defendant is nothing more than speculation and sufficient evidence was presented from which a rational jury could conclude guilt beyond a reasonable doubt, claimed error on these points and a claim of ineffective assistance of counsel in connection with the claimed errors must fail. We affirm.

On January 18, 2003, defendant was housed in Spruce unit, the transition unit of the Alger County Maximum Security Prison. An altercation erupted between defendant and the officer who was returning defendant to his cell when defendant turned and grabbed the officer by the shirt and attempted to head-butt him. Officers eventually restrained defendant.

Defendant first argues that he was denied due process of law by the prosecution’s failure to produce potentially exculpatory evidence. Defendant’s argument centers on the possible existence of a videotape of the incident made by a hand-held video camera located inside a secure area in the Spruce unit.¹ The area, known as a “bubble” is completely enclosed in glass. Because this issue was not raised below, we review for plain error affecting substantial rights.

¹ Defendant also makes assertions that there are a lack of still photographs supporting his version of the incident. However, these statements are merely complaints about how the incident was investigated rather than an argument that the prosecution withheld exculpatory photographs. This is not the proper forum for investigation complaints and we decline to address it.

People v Carines, 460 Mich 750, 764; 597 NW2d 130 (1999). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . 3) and the plain error affected substantial rights The third requirement generally requires a showing of prejudice” *Id.* at 763. Further, if the three elements of the plain error rule are established, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings” independent of the defendant’s innocence.’” *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

A review of the record reveals that defendant’s argument to be pure speculation, and we conclude it is without merit. Defendant has not shown that this videotape ever existed, let alone whether the prosecution knowingly suppressed it. Both officers involved in the incident testified that the camera in the Spruce bubble was not working when the incident occurred. The victim testified that the camera was, in effect, a decoy placed in a visible central location so that it might deter suspected trouble in the unit. While the prison official investigating the incident admitted that his investigation report makes it sound like there was a video, he explained that he had written the report in such a fashion because the prison “didn’t want the prisoners to know that there wasn’t a video in that unit.”

In all, seven witnesses were questioned with respect to the videotape and none of them testified that they had any knowledge that such a videotape existed. The evidence does not support defendant’s speculation about the existence of a videotape of the incident. There is no indication that the hand-held camera was operational at the time of the assault and directed toward defendant’s cell. Therefore, defendant has not shown plain error affecting substantial rights. *Carines*, *supra*.

Defendant also argues that he was deprived of his right to effective assistance of counsel by counsel’s failure to move for a directed verdict. Where, as here, a defendant has not moved for a *Ginther*² hearing, our review is limited to the record. *People v Sabin (After Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). “To prove a claim of ineffective assistance of counsel . . . a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial.” *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

Defendant argues that counsel was ineffective for failing to move for a directed verdict based on the prosecution’s failure to produce the alleged videotape. As we concluded above, this argument amounts to speculation. Ineffective assistance of counsel cannot be premised on counsel’s failure to make a frivolous or meritless motion based on speculation. See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Further, any motion for a directed verdict would have been futile. In such a motion, the evidence adduced at trial is viewed in the light most favorable to the prosecution to determine whether evidence sufficient to support a rational juror in finding guilt beyond a reasonable doubt was lacking. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). Here, the prosecution offered testimony by the officer who was attacked that defendant committed the assault. Even though this evidence is in direct conflict with defendant's version of the events, it must be viewed in the light most favorable to the prosecution. *Id.* Recognizing the jury's superior ability to assess witness credibility, we conclude that defendant cannot show that defense counsel's failure to move for a directed verdict amounted to ineffective assistance of counsel. *Id.* at 637.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio